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DISCUSSION OF RECENT DECISIONS

CONSTITUTIONAL LAW—DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS—AMENABILITY OF SALARY OF FEDERAL JUDGE TO INCOME TAX.—In 1932 Congress passed an income tax statute including in gross income the compensation of "judges of courts of the United States taking office after June 6, 1932." A federal district judge was subsequently appointed to the position of circuit judge, and, as such, he was taxed upon his salary. Paying the tax under protest, he sued to get it back on the ground that the tax was an unconstitutional diminution of a federal judge's salary.¹ The United States Supreme Court denied his claim.²

Since the positions of circuit and district judge are wholly separate, the plaintiff was treated as one who had taken office after the date mentioned in the statute. This being so, the court stated, "To suggest

¹ U.S. Const., Art. 3, § 1: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

² O'Malley v. Woodrough, 83 L. Ed. (Adv.) 850 (1939).

that it [the tax] makes inroads upon the independence of judges who took office after Congress had thus charged them with the common duties of citizenship, by making them bear their aliquot share of the cost of maintaining the Government is to trivialize the great historic experience on which the framers based the safeguards of Article 3, § 1. To subject them to a general tax is merely to recognize that judges are also citizens. . . ." The opinion disapproved of the decision in *Evans v. Gore*³ and overruled *Miles v. Graham*⁴ to the extent of its inconsistency with the instant case.

The constitutional clause affirming that the compensation of judges "shall not be diminished during their Continuance in Office"⁵ was construed to forbid indirect diminution by income taxation of the salaries of judges in a letter written by Chief Justice Taney to the Secretary of the Treasury.⁶ In *Evans v. Gore*⁷ a district judge was held exempt from taxation under a later statute taxing all net income "including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States . . . the compensation received as such." The court said that an indirect diminution of the salary by taking back part of it under a tax was well within the constitutional prohibition.⁸ Justice Holmes, however, dissented, because (1) the tax does not violate the spirit of the constitutional clause, because a tax which all must pay will not affect the independence of the judiciary, (2) the tax does not violate the letter of the clause, because after the judge gets the salary it loses its non-taxable character, and (3) at any rate, the sixteenth amendment would validate the tax, since the words

³ 253 U.S. 245, 40 S. Ct. 550, 64 L. Ed. 887, 11 A.L.R. 519 (1920).

⁴ 268 U.S. 501, 45 S. Ct. 601, 69 L. Ed. 1067 (1925).

⁵ U.S. Const., Art. 3, § 1.

⁶ Letter of Chief Justice Taney to Hon. S. P. Chase, Secretary of the Treasury, 157 U.S. 701, 15 S. Ct. ix, 39 L. Ed. 1155 (1863). Finding that an income tax law had been construed to include federal judges, the Chief Justice wrote, "Language could not be more plain than that used in the Constitution. It is, moreover, one of its most important and essential provisions. For the articles which limit the powers of the legislative and executive branches of the government, and those which provide safeguards for the protection of the citizen in his person and property, would be of little value without a judiciary to uphold and maintain them, which was free from every influence, direct or indirect, that might by possibility in times of political excitement warp their judgments."

"Upon these grounds I regard an Act of Congress retaining in the Treasury a portion of the compensation of the judges, as unconstitutional and void. . . ."

Justice Field, concurring in overthrowing an income tax law, later stated, "The law of Congress is also invalid in that it authorizes a tax upon the salaries of the judges of the courts of the United States, against the declaration of the Constitution that their compensation shall not be diminished during their continuance in office." *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 at 604, 15 S. Ct. 673, 39 L. Ed. 759 at 827 (1895).

⁷ 253 U.S. 245, 40 S. Ct. 550, 64 L. Ed. 887, 11 A.L.R. 519 (1920).

⁸ All diminutions "which, by their necessary operation and effect, withhold or take from the judge a part of that which has been promised by law for his services, must be regarded as within the prohibition."

"from whatever source derived" in that amendment⁹ are mere surplusage unless construed to give power to tax incomes from anywhere.¹⁰

With the statute thus multilated, the Treasury Department did not give up hope, instead attempting to tax a judge of the court of claims who was appointed *after* the act was passed and who consequently, it was thought, could not object that his compensation was being diminished during his continuance in office. He also paid under protest and was allowed to recover in a suit for the tax. The District Court, although it expressed a doubt as to whether federal judges could ever be taxed on their salaries,¹¹ placed the decision on the firm ground that the clause taxing all judges had been declared unconstitutional and the court would not rewrite the statute for Congress to tax only judges taking office after the statute was passed.¹² But the Supreme Court, while affirming the District Court and quoting its holding, seems to have handed down, in *Miles v. Graham*,¹³ the proposition that, when Congress definitely declares a certain sum to be the compensation for a federal judge, it cannot in a separate tax cut down that sum, even though the taxing statute was passed before the salary was fixed.¹⁴ This is obviously inconsistent with the holding in the instant case.

However, the present case also manifests a hostile intent toward

⁹ "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration." U.S. Const., Amendment 16.

¹⁰ However, Mr. Justice Holmes apparently later changed his mind. See *Gillespie v. Oklahoma*, 257 U.S. 501 at 505, 42 S. Ct. 171, 66 L. Ed. 338 at 341 (1922), where he cites *Evans v. Gore* with apparent approval.

¹¹ "Under our system of surtaxes constantly changing, both in rate and method of ascertainment, and even under the same statute being greatly affected by the greater or less receipt of income from other sources, the actual tax imposed upon a judge's salary will constantly vary." *Graham v. Miles*, 284 F. 878 at 880 (1922).

¹² The opinion, however, seems to express a wistful preference for the dissent in the *Evans* case. *Graham v. Miles*, 284 F. 878 at 881 (1922).

¹³ 268 U.S. 501, 45 S. Ct. 601, 69 L. Ed. 1067 (1925).

¹⁴ "The words and history of the clause indicate that the purpose was to impose upon Congress the duty definitely to declare what sum shall be received by each judge out of the public funds and the times for payment. When this duty has been complied with, the amount specified becomes the compensation which is protected against diminution during his continuance in office." *Miles v. Graham*, 268 U.S. 501 at 508, 45 S. Ct. 601, 69 L. Ed. 1067 at 1070 (1925). However, in *Ex parte Bakelite Corp.*, 279 U.S. 438 at 455, 49 S. Ct. 411, 73 L. Ed. 789 at 796 (1929), the court in an elaborate dictum said that the court of claims was a mere legislative, and not a constitutional, court, apparently disapproving *Miles v. Graham*. Mere legislative courts are not subject to the constitutional restriction against diminishing a judge's salary. For a full discussion of this, see Wilbur G. Katz, "Federal Legislative Courts," 43 Harv. L. Rev. 894 at 907; *O'Donoghue v. United States*, 289 U.S. 516, 53 S. Ct. 740, 77 L. Ed. 1356 (1933); *Williams v. United States*, 289 U.S. 553, 53 S. Ct. 751, 77 L. Ed. 1372 (1933). See also note, 46 Harv. L. Rev. 677 at 680, which says, "The Bakelite opinion must be taken to overrule *Miles v. Graham*."

Evans v. Gore,¹⁵ whose holding, like the doctrine of reciprocal tax immunities, seems "presently marked for destruction." Division of authority on the question is indicated among the state courts which have had to construe similar provisions in state constitutions.¹⁶ However, to support Mr. Justice Holmes's argument that a tax upon a judge's net income is no more a diminishing of his salary than a tax upon his house would be, there are several encouraging analogies. The supremacy of state and federal governments in their respective spheres requires that each be immune in its sphere from hindrance by the other, but this has recently been held not to bar taxation which does not burden the exercise of the governmental function;¹⁷ and this is of added importance because the court in the *Evans* case took as persuasive the old absolute immunity rule of *Collector v. Day*.¹⁸ True, here the analogy is not exact, since this is a mere implied constitutional restriction whose content may change as necessity demands, whereas in the case of the federal judges the Constitution is explicit.

Similarly, the power of Congress to regulate interstate commerce¹⁹ has been construed to bar the states from thus taxing such commerce,²⁰ but this does not prohibit a tax by a state upon the net income of a domestic corporation engaged in such commerce.²¹ Again, however, we

¹⁵ 253 U.S. 245, 40 S. Ct. 550, 64 L. Ed. 887, 11 A.L.R. 519 (1920).

¹⁶ See *Martin v. Wolford*, 269 Ky. 411, 107 S. W. (2d) 267 (1937), holding a state judge taxable under such a provision; *Taylor v. Gehner*, 329 Mo. 511, 45 S.W. (2d) 59, 82 A.L.R. 986 (1931), also holding a state judge taxable; *Poorman v. State Bd. of Equalization*, 99 Mont. 543, 45 P. (2d) 307 (1935), containing a similar holding; *Commissioners v. Chapman*, 2 Rawle (34 Pa.) 73 (1829), to the same effect. The last case has sometimes been thought to be overruled by *Commonwealth ex rel. Hepburn v. Mann*, 5 Watts & S. (61 Pa.) 403 (1843). Actually, however, this last case involved a discriminatory tax, and the court states at 417, "The property of a judge, his income, whether derived from this or any other source, we admit is a proper subject of taxation." See also *Dupont v. Green*, 195 A. 273 (Del., 1937), holding an attorney general taxable under a constitution protecting "public officers" from diminution of their salaries; *State ex rel. Wickham v. Nygaard*, 159 Wis. 396, 150 N.W. 513 (1915), in which, however, a state constitutional amendment affected the issue. For cases holding judges not taxable under such provisions, see *City of New Orleans v. Lea*, 14 La. Ann. 197 (1859); *Gordy v. Dennis*, 5 A. (2d) 69 (Md. 1939); Letter of Attorney General of North Carolina, 48 N.C. 543 (1856); *In re Taxation of Salaries of Judges*, 131 N.C. 692, 42 S.E. 970 (1902); *Purnell v. Page*, 133 N.C. 125, 45 S.E. 534 (1903); *Long v. Watts*, 183 N.C. 99, 110 S.E. 765, 22 A.L.R. 277 (1922).

¹⁷ *Graves v. New York ex rel. O'Keefe*, 59 S. Ct. 595, 83 L. Ed. (Adv.) 577, 120 A.L.R. 1466 (U.S., 1939). For the history and principles of this doctrine, see note, 17 CHICAGO-KENT LAW REVIEW 159.

¹⁸ 11 Wall. 113, 20 L. Ed. 122 (1871).

¹⁹ U.S. Const., Art. 1, § 8, Clause 3.

²⁰ *Philadelphia etc. Mail Steamship Co. v. Pennsylvania*, 122 U.S. 326, 7 S. Ct. 1118, 30 L. Ed. 1200 (1887); *Ratterman v. Western Union Telegraph Co.*, 127 U.S. 411, 8 S. Ct. 1127, 32 L. Ed. 229 (1888).

²¹ *United States Glue Co. v. Oak Creek*, 247 U.S. 321, 38 S. Ct. 499, 62 L. Ed. 1135 (1918). See also *St. Louis Southwestern R. Co. v. Arkansas ex rel. Norwood*, 235 U.S. 350, 35 S. Ct. 99, 59 L. Ed. 265 (1914); *Postal Telegraph Cable Co. v. Adams*, 155 U.S. 688, 15 S. Ct. 268, 39 L. Ed. 311 (1895); *Attorney-General of Massachusetts v. Western Union Tel. Co.*, 141 U.S. 40, 11 S. Ct. 889, 35 L. Ed. 628

have the objection that this restriction on the power of the states is merely implied and should be implied no further than necessary.²² This is not so in the case of the express constitutional prohibition against the taxing of exports,²³ which does not prevent a tax upon the net income of a corporation engaged in the export business,²⁴ since the clause is interpreted as requiring that exportation be free "from any tax which *directly* burdens the exportation." A strong parallel can be drawn between reasoning based on the fact that "the tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses,"²⁵ and the contention of Justice Holmes that once the salary is in a judge's hands it loses its immune character.

As to the contention that the broad language of the Sixteenth Amendment, giving power to tax incomes "from whatever source derived," should permit the tax, the amendment indicates on its face that it bestows such power. However, the court, in other factual situations, has used language limiting the scope of that amendment.²⁶ Nonetheless, upon the one ground or the other, it appears that the immunity of the salaries of federal judges is doomed.

R. W. BERGSTROM

DEEDS — CONSTRUCTION AND OPERATION OF RESERVATION — WHETHER GRANTOR MAY RESERVE LIFE ESTATE TO SPOUSE. — A married woman who owned property in her own right wished to give it to her sons, providing that she and her husband should have the use of the land during their respective lives. The husband joined in the conveyance with the wife, thereby waiving his dower and homestead rights, and a reservation was inserted in the deed, as follows: "The aforesaid Grantors hereby expressly reserve unto themselves the use of the above conveyed premises for and during the time of their natural lives." The wife predeceased her husband, and his creditors sought to levy on his interest in the land, claiming that he had a life estate in the property. The grantors'

(1891); *Maine v. Grand Trunk R. Co.*, 142 U.S. 217, 12 S. Ct. 121, 35 L. Ed. 994 (1891); *Pullman's Palace Car Co. v. Commonwealth of Pennsylvania*, 141 U.S. 18, 11 S. Ct. 876, 35 L. Ed. 613 (1891).

²² For a possible further qualification see *Escanaba, Etc., Trans. Co. v. Chicago*, 107 U.S. 678, 2 S. Ct. 185, 27 L. Ed. 442 (1883).

²³ "No tax or duty shall be laid on articles exported from any state." U.S. Const., Art. 1, § 9, Clause 5.

²⁴ *William E. Peck & Co. v. Lowe*, 247 U.S. 165, 38 S. Ct. 432, 62 L. Ed. 1049 (1918). See also *Turpin v. Burgess*, 117 U.S. 504, 6 S. Ct. 835, 29 L. Ed. 988 (1886).

²⁵ *William E. Peck & Co. v. Lowe*, 247 U.S. 165 at 175, 38 S. Ct. 432, 62 L. Ed. 1049 at 1052 (1918).

²⁶ *Stanton v. Baltic Min. Co.*, 240 U.S. 103 at 112, 36 S. Ct. 278, 60 L. Ed. 546 at 554 (1916); *Brushaber v. Union P. R. Co.*, 240 U.S. 1 at 17, 36 S. Ct. 236, 60 L. Ed. 493 at 501 (1916), noted in 29 Harv. L. Rev. 536; *Peck & Co. v. Lowe*, 247 U.S. 165 at 172, 38 S. Ct. 432, 62 L. Ed. 1049 at 1051 (1918); *Eisner v. Macomber*, 252 U.S. 189 at 206, 40 S. Ct. 189, 64 L. Ed. 521 at 528, 9 A.L.R. 1570 (1920). For a strong argument that the sixteenth amendment should be construed liberally, see *Taxation of Government Bondholders and Employees*, A Study by the Department of Justice (U.S. Govt. Printing Office, 1939).

sons, who were also the grantees in the deed, brought suit in equity in the nature of a bill to quiet title to the land. The Illinois Appellate Court held, in *Saunders v. Saunders*,¹ that a grantor cannot make a reservation in a deed in favor of a third person, even if that third person be a spouse of the grantor.

That a reservation to a stranger in a deed is void in the absence of an excepting clause and specific words of grant to the third party is well settled.² But although a reservation will not give any title to a stranger, it may operate as an exception to the grant, if such appears to be the intention of the parties.³ However, even where the reserved estate is held to operate as an exception, such estate cannot vest in the third party unless there are words of grant to him in the deed.⁴ So our grantor in the instant case is precluded from taking advantage of this exception to the general rule in attempting to reserve a life estate to her spouse.

But, contended the defendants, there is another exception to the rule, recognized in Illinois, in the case of the reserving of a life estate to a spouse. That there is such an exception to the general rule in favor of a husband and wife is recognized and followed in many states.⁵ Thus it is held in Michigan that, where a husband and wife are the grantors, they may reserve to both, or to the survivor of them, a life estate in

¹ 300 Ill. App. 368, 21 N.E. (2d) 34 (1939).

² Tiedeman on Real Property, 3rd Ed., § 608, p. 884; Jones on Real Property, Vol. I, § 528, p. 438; *Roberts v. Dazey*, 284 Ill. 241, 119 N.E. 910 (1918); *Butler v. Gosling*, 130 Cal. 422, 62 P. 596 (1900); *Stone v. Stone*, 141 Ia. 438, 119 N.W. 712, 20 L.R.A. (N.S.) 221 (1909); *Hill v. Lord*, 48 Me. 83 (1861); *Herbert v. Pue*, 72 Md. 307, 20 A. 182 (1890); *Burchard v. Walther*, 58 Neb. 539, 78 N.W. 1061 (1899); *Beardslee v. New Berlin Light, Etc. Co.*, 207 N.Y. 34, 100 N.E. 434, Ann. Cas. 1914 B 1287 (rev. 140 App. Div. 942, 125 N.Y.S. 1112) (1912); *Edwards v. Brusha*, 18 Okl. 234, 90 P. 727 (1907); *In re Palin*, 28 R.I. 12, 65 A. 282 (1906); *Brace v. Van Eps*, 21 S.D. 65, 109 N.W. 147 (1906); *Simmons v. Northern Pac. Ry. Co.*, 88 Wash. 384, 153 P. 321 (1915); *Strasson v. Montgomery*, 32 Wis. 52 (1873); *Whitlock's Case*, 8 Coke 69b, 77 Eng. Rep. 580.

³ *Martin v. Cook*, 102 Mich. 267, 60 N.W. 679 (1894), citing *Shep. Touch.* 86; *Bridger v. Pierson*, 45 N.Y. 601 (1871); *West Point Iron Co. v. Reymert*, 45 N.Y. 703 (1871); *Richardson v. Palmer*, 38 N.H. 212 (1859); *Corning v. Troy Iron and Nail Factory*, 40 N.Y. 191 (1869); *Hall v. Ionia*, 38 Mich. 493 (1878); *Ericson v. Michigan Land & Iron Co.*, 50 Mich. 604, 16 N.W. 161 (1883); *Bassett v. Budlong*, 77 Mich. 338, 43 N.W. 984 (1889).

⁴ *Lemon v. Lemon*, 273 Mo. 484, 201 S.W. 103 (1918); *Legout v. Price*, 318 Ill. 425, 149 N.E. 427 (1925).

⁵ *Graves v. Atwood*, 52 Conn. 512, 52 Am. Rep. 610 (1885); *Martin v. Stewart*, 33 Ky. L. 729, 111 S.W. 281 (1908); *Hollomon v. Hollomon*, 12 La. Ann. 607 (1857); *Watson v. Cressey*, 79 Me. 381, 10 A. 59 (1887); *Steel v. Steel*, 4 Allen (86 Mass.) 417 (1862); *Martin v. Cook*, 102 Mich. 267, 60 N.W. 679 (1894); *Dennett v. Dennett*, 40 N.H. 498 (1860). A conveyance for a valuable consideration on condition that the grantor and his wife shall have the use and possession of the property for life may be construed as a conveyance with a condition subsequent that the grantee shall permit such use, or an agreement to convey the use after the grantor's death, or a covenant to stand seized to the use of the grantor for life, then of his wife, and the remainder to the grantee, and may be enforced in equity. *Sherman v. Estate of Dodge*, 28 Vt. 26 (1855).

the property.⁶ An early New York court did not allow the deed to operate as a reservation in favor of the surviving spouse, but held it good as a covenant to stand seised to the use of the grantor during his life and after his death to the use of his wife for life.⁷ The Pennsylvania court held the same way under a like situation.⁸

In a Kentucky case,⁹ it was held that a deed reserving to the grantor and his wife the usufruct of the property during their lives or the life of the survivor does not violate rules against estates to vest in the future or forbidding reservation of an estate to a stranger or one not a party to the deed.¹⁰ In North Carolina, the court has held that a grantor and his wife hold a life estate by the entirety under a deed by them reserving such estate to them, the widow becoming sole tenant for life on the death of the husband.¹¹

However, this exception in favor of husband and wife has been rejected by other courts.¹² The Missouri court, for one, has several times refused to depart from the general rule. In *Lemon v. Lemon*,¹³ the grantor, who owned the land, reserved for himself the rents and profits and excepted from the conveyance a life estate and attempted to reserve and except for his wife a similar estate and interest for her life. "But unfortunately," said the court, "he reserved it in himself, and did not convey, nor has he ever conveyed it to the defendant."¹⁴

In Illinois the general rule is recognized and accepted.¹⁵ But as to the allowance of a reservation in a deed of a life estate to a non-owning spouse, there is some doubt. That the exception has also been allowed in Illinois has been the understanding of many attorneys, and in so believing they rely on the often-cited case of *Dubois v. Judy*.¹⁶ Here a warranty deed conveyed property to "the heirs-at-law of Woodson P. Greene . . . reserving herein, however, and hereby conveying to Woodson P. Greene a life estate in the above described real estate, the said grantees first above named to have and receive said lands at the death of Woodson P. Greene." In answering the argument that the rule in *Shelley's* case does not apply, the court said, "Strictly, a reservation in a deed is some right in favor of the grantor created out of or retained in the granted premises. A purported reservation in favor of a third person can only take effect as a grant to him by way of exception to

⁶ *Derham v. Hovey*, 195 Mich. 243, 161 N.W. 883, 21 A.L.R. 999 (1917).

⁷ *Jackson v. Swart*, 20 Johns. (N.Y.) 85 (1822).

⁸ *Sergeant v. Ford*, 2 Watts & S. (Pa.) 122 (1841).

⁹ *Hall v. Meade*, 244 Ky. 718, 51 S.W. (2d) 974 (1932).

¹⁰ See also *Francis v. Combs*, 221 Ky. 644, 299 S.W. 543 (1927), where a deed by a sole owner of the fee reserving a life estate to herself and husband was held to establish a life estate in the surviving husband.

¹¹ *Jones v. Potter*, 89 N.C. 220 (1883). See also *Reynolds v. Powell*, 10 Ky. L. 932, 11 S.W. 202 (1889).

¹² See note, 39 A.L.R. 128 for an annotation on the general subject.

¹³ 273 Mo. 484, 201 S.W. 103 (1918).

¹⁴ To the same effect, see *Meador v. Ward*, 303 Mo. 176, 260 S.W. 106 (1924).

¹⁵ *Roberts v. Dazey*, 284 Ill. 241, 119 N.E. 910 (1918); *Eckhart v. Irons*, 18 Ill. App. 173 (1885); *Legout v. Price*, 318 Ill. 425, 149 N.E. 427 (1925).

¹⁶ 291 Ill. 340, 126 N.E. 104 (1920).

the other grant and in such case, there must be words of conveyance to the third person, except that a grantor may reserve to himself and his wife an estate during their natural lives, which will continue during the life of a survivor." This last statement was obviously not material to the determination of the case.

In support of the above statement, the Supreme Court cites the case of *White v. Willard*.¹⁷ Here devisees under the grantor's will sued to set aside deeds, one of which reserved a life estate to his wife, on the grounds (1) that there was no delivery, and (2) the deeds were testamentary dispositions, mainly because of the statement in one deed that the grantees' interest was not to become "absolute" till after the death of the grantors.

As to the "testamentary" argument, the court observed, "In the view we take of the foregoing clause, it has no other effect than to reserve a life estate in the grantor and his wife and the survivor of them." And as to delivery, the surviving spouse was held to have been given sufficient interest by the reservation of the life estate to disqualify her from testifying.

These two, together with *Abel v. Schuett*,¹⁸ are the only cases cited as supporting the application of an exception to the general rule in favor of husband and wife, and the last case is pure dicta on this point. The Appellate Court in the instant case dismisses both the Dubois case and the White case as dicta, relying on *Lemon v. Lemon*, the Missouri case mentioned above, and *Bullard v. Suedmeier*,¹⁹ where the deed contained this clause: "This conveyance shall not take effect during the lifetime of the grantor, Christian Suedmeier and Anna Margaret Suedmeier." The owner of the land, the grantor, died before his spouse who claimed a life estate in the conveyed premises. The court found that the widow did not have a life estate in, or the use of the premises.

Thus it seems to be a case of the Appellate Court specifically holding contrary to the attitude of the Supreme Court, but one can only hazard a guess as to the outcome should this case or a similar one come before the Supreme Court.

E. R. BERNSTEIN

DEEDS—ESTATES AND INTERESTS CREATED—WHEN THE WORDS, "HEIRS OF HER BODY," WILL BE CONSTRUED AS WORDS OF PURCHASE AND NOT OF LIMITATION.—Modern courts have shown a gratifying tendency to apply rules of construction less rigorously than was formerly the practice, particularly in cases involving expressions or limitations which the courts have never had occasion to consider in the past.

This tendency is well illustrated in the recent case of *Albers v. Donovan*,¹ where the conveyance was to "Jennie Donovan and the heirs born of her body in fee simple." The question for decision was whether the limitation created a fee tail, subject to the Statute on Entails,² or a class gift in fee simple to Jennie Donovan and the

¹⁷ 232 Ill. 464, 83 N.E. 954 (1908).

¹⁸ 291 Ill. 400, 126 N.E. 117 (1920).

¹⁹ 371 Ill. 458, 21 N.E. (2d) 563 (1939).

¹⁸ 329 Ill. 323, 160 N.E. 548 (1928).

² Ill. Rev. Stat. 1937, Ch. 30, § 5.

heirs of her body. The answer of the Illinois Supreme Court was that a class gift was created.

After the Statute de Donis in 1285, a conveyance to devise to A and the heirs of his body was so construed that an estate tail passed, A taking a fee for his life and the heirs of his body in successive generations taking the fee for their respective lives. The estate would terminate only when A's line became extinct. Because this result was undesirable, the Illinois legislature, in 1827, passed the Statute on Entails which provided that what would have been a fee tail at common law is an estate in A for life, with the remainder in fee simple absolute to the person or persons to whom the estate tail would have passed upon the death of A.

The words, "heirs of the body," are presumed to be used technically as words of limitation except where the contrary appears on the face of the instrument.³ One of the first cases in which this problem arose was *Perrin v. Blake*⁴ where the court said "if the intent of the testator manifestly and certainly appeared, (by plain expression, or necessary implication from other parts of the will,) that the heirs of the body of A should take by purchase, and not by descent. . . ."

Illinois has very clearly followed this view as shown by a long line of decisions,⁵ and the case of *Butler v. Huestis*⁶ is typical. According to the facts, the will gave and bequeathed to Altieri A. Huestis the property with the use, rents and profits during her life, "the reversion and fee thereof to the heirs of her body at and after her decease." It was stated in the opinion that the fact that the enjoyment of the estate was postponed until "at and after her decease" and then to become absolute showed clearly that the testatrix did not use the words "heirs of her body" in the sense of words of limitation, but it better effected the purpose of the testatrix to construe the words as words of purchase.

In the instant case, the court said that the language on the face of the deed indicated no intent to create a common law fee tail and that the additional words "in fee simple" showed that the grantor intended the words, "heirs born of her body," as words of purchase to describe the persons who were to share in the estate. If the words had been construed as words of limitation, the estate created would have been a fee tail, and it would have been necessary to hold that the words, "in fee simple," were surplusage. For these reasons the conclusion that Jennie Donovan and the heirs of her body held the estate as tenants in common seems to be a proper one. The decision is a striking example of the trend towards construing "heirs" or "heirs

³ 18 C. J. 324, § 314(b).

⁴ 4 Burr. 2579 at 2581, 98 Eng. Rep. 355 at 357 (1770).

⁵ *Hempstead v. Hempstead*, 285 Ill. 448, 120 N.E. 782 (1918); *Griswold v. Hicks*, 132 Ill. 494, 24 N.E. 63 (1890); *Baulos v. Ash*, 19 Ill. 187 (1857); *Bunn v. Butler*, 300 Ill. 269, 133 N.E. 246 (1921); *Hickox v. Klaholt*, 291 Ill. 544, 126 N.E. 166 (1920).

⁶ 68 Ill. 594 (1873).

of the body" as words of purchase and not of limitation when by so doing, the intention of the settlor, as gathered from the entire instrument, will be given effect.

V. BUSSE

INFANTS—APPEAL AND ERROR—VALIDITY OF A JUDGMENT RENDERED AGAINST AN INFANT FOR WHOM NO GUARDIAN AD LITEM WAS APPOINTED.—Where an infant is a party to the trial of a cause and no guardian ad litem is appointed by the court to represent him, is a judgment rendered against the minor subject to be reversed, set aside, or vacated on the sole ground that no guardian ad litem was appointed? In the case of *Zielinski v. Pleason*,¹ the court said that some injustice must be made to appear because of the failure to appoint a guardian ad litem for the infant before the judgment will be vacated. There the infant plaintiff brought an action for damages as the result of an automobile accident, and the defendant counterclaimed, alleging that the plaintiff was negligent. Judgment was rendered for the defendant on the claim and counterclaim. The fact of the plaintiff's infancy was not called to the attention of the court until the motion of the plaintiff for a new trial, which motion was overruled. But the lower court then appointed the plaintiff's mother as guardian ad litem to represent him in any further proceedings of the cause. The judgment was reversed, however, on the merits of the case.

"At common law, if an infant plaintiff was not represented by his general guardian, he was required to sue by guardian ad litem; but by the Statute of Westminster he was authorized to sue also by next friend."² The reason for this rule was that an infant was presumed to have insufficient discretion to choose a proper person to represent him, and so the law put it out of his power to injure himself.³ The appointment of a guardian ad litem is not a matter of jurisdiction but of procedure, and where a judgment is rendered against an infant plaintiff or defendant for whom no guardian ad litem has been appointed, the judgment is not void, but voidable, and is subject to direct attack only.⁴

The more widely entertained opinion⁵ is that failure to appoint a guardian ad litem for an infant properly before the court is grounds

¹ 299 Ill. App. 594, 20 N.E. (2d) 620 (1939).

² 31 C.J. 1124, § 271(b).

³ Note 1, *Hesketh v. Lee*, 2 Wms. Saund. 94, 85 Eng. Rep. 766 (1669).

⁴ 14 R.C.L. 286, § 54.

⁵ Where the infant defendant appeared and pleaded, see *Richmond v. Tayleur*, 1 P. Wms. 734, 24 Eng. Rep. 591. (1721); *Ralston v. Lahee*, 8 Iowa 17 (1859); *English v. Savage*, 5 Or. 518 (1875); *Crockett v. Drew*, 5 Gray 399 (1855); *Frost v. Frost*, 37 N.Y.S. 18 (1895); *Chapman v. Branch*, 72 W.Va. 54, 78 S.E. 235 (1913); *Conto v. Silvia*, 170 Mass. 152, 49 N.E. 86 (1898); *Barber v. Graves*, 18 Vt. 290 (1846). Where the infant defaulted, see *O'Hara v. McConnell*, 93 U.S. 150, 23 L.Ed. 840 (1876). Where the infant was plaintiff see *Conway v. Clark*, 177 Ala. 99, 58 So. 441 (1912).

for a new trial⁶ or for the reversal or vacation of the judgment, without regard to actual prejudice to the infant.

In *Johnson v. Waterhouse*,⁷ involving a tort action, the infant defendant was assisted in his defense by his father, but no guardian ad litem was appointed. The court maintained that a judgment could not be properly rendered against an infant unless he has a guardian by whom he may defend, and if the judgment is so rendered, the infant is entitled to maintain a writ of error to have the judgment reversed. The fact that the father assisted the infant will not affect the decision since no legal right of guardianship or of parentage will enable any one to act for the infant without an appointment by court as guardian. The Illinois courts previous to the Zielinski case have generally held that such a judgment is erroneous and that the record must show affirmatively that a guardian ad litem has been appointed; otherwise the judgment will be reversed on appeal or error, without regard to the merits of the case.⁸

The court in the instant case relied on several Illinois decisions to support its conclusion. One of the cases, *Lemon v. Sweeney*,⁹ was a bill for an injunction to restrain the collection of a judgment rendered against the infant, but the court said that since there was no allegation that the judgment was unjust, and because equity will interfere only to prevent injustice, failure to appoint a guardian ad litem did not cause the judgment to be void. The case is not authority for the case at hand because in the former the judgment was not attacked in the same court where it was originally handed down. The other case of *People ex rel. Landwehr v. Humbracht*¹⁰ was a proceeding under the Bastardy Act.¹¹ Such proceeding is criminal in part, and it was held that it is not necessary to appoint a guardian ad litem in criminal actions. Hence, neither case appears to be sufficiently in point to support the present decision. There was also cited an Idaho case, *Trolinger v. Cluff*,¹² in which the decision was to the effect that, unless the minor makes some showing that he has a meritorious defense or has been misled or been deprived of some legal right because of his minority, he should not be permitted to have the judgment vacated on the sole ground of failure to appoint a guardian ad litem. But this case was based upon a statute¹³ which provides,

⁶ 31 C.J. 1121, § 266(4).

⁷ 152 Mass. 585, 26 N.E. 234 (1891).

⁸ Where the infant was defendant and appeared and pleaded without a guardian ad litem, see *Bellchambers v. Ebeling*, 294 Ill. App. 247, 13 N.E. (2d) 804 (1938); *McCarthy v. Cain*, 301 Ill. 534, 134 N.E. 62 (1922); *Collins v. Hastings*, 283 Ill. App. 304 (1936); *Thurston v. Tubbs*, 250 Ill. 540, 95 N.E. 479 (1911). Where the infant defaulted, see *Peak v. Shasted*, 21 Ill. 137, 74 Am. Dec. 83 (1859); *Quigley v. Roberts*, 44 Ill. 503 (1867); *White v. Kilmartin*, 205 Ill. 525, 68 N.E. 1086 (1903).

⁹ 6 Ill. App. 507 (1880).

¹⁰ 215 Ill. App. 29 (1919).

¹¹ Ill. Rev. Stat. 1937, Ch. 17.

¹² 56 Idaho 570, 57 P. (2d) 332 (1936).

¹³ Idaho Rev. Codes (1932), § 4231 (I.C.A. § 5-907). There is also another statute, I.C.A. § 5-306, providing that failure to appoint a guardian ad litem for an infant defendant does not warrant setting aside, vacating or reversing a judgment or decree unless substantial rights of the infant are affected by the failure.

"The court must, in every stage of an action, disregard any error or defect in pleadings or proceedings which does not affect the substantial rights of the parties and no judgment shall be reversed or affected by reason of such error or defect."

A few other jurisdictions have similar statutes¹⁴ upon which their courts rely in consideration of this question, and therefore since Illinois does not have such provision, it is not advisable that cases from these states be followed in Illinois. However, Illinois does have a statute which recites "... nor shall any judgment upon verdict . . . be reversed, impaired or in any way affected . . . for any other default or negligence of any officer of the court, or of the parties or their counselors or attorneys, by which neither party shall have been prejudiced."¹⁵ This statute is broad enough so that a court, in reliance upon it, might hold that the judgment against an infant will not be reversed or vacated except where substantial injustice appears as a result of the failure to appoint a guardian ad litem, but research has not revealed an Illinois case so applying the provision.

An infant is, in the eyes of the law, incapable of handling his own affairs. He is at a disadvantage because of his youth and inexperience, and the court should see to it that his interests are properly protected by appointing a guardian ad litem to assist him. However, when the infant has had the benefit of capable counsel and when his case has been handled to the best possible advantages, the infant should not be allowed to have the judgment reversed or set aside merely for failure to appoint a guardian ad litem, especially when there is no showing that the result might have been different had a guardian ad litem taken charge of the minor's suit or defense. It would be unfair to burden the other parties with the expenses of another trial in such case. This viewpoint is a logical one, and is worthy of consideration though the prevailing Illinois view and the weight of authority in those jurisdictions not controlled by statute is contrary.

V. BUSSE

INJUNCTION—SUBJECTS OF PROTECTION AND RELIEF—NECESSITY OF AN EMPLOYER-EMPLOYEE RELATIONSHIP UNDER THE ILLINOIS ANTI-INJUNCTION ACT.—The Meadowmoor Dairy Company sells its products to independent contractors, called vendors, who in turn sell to stores and homes. This method of marketing seems to be very efficient, because the company has been able to dispose of its products at a lower price than those of other dairies which were compelled, because of a decreased volume of

¹⁴ Ark. Civil Procedure Code (1937), § 657 and 657(1). See also Callaghan's Mich. Stat. Ann., § 27.2618 providing that "No judgment or verdict shall be set aside or reversed, or a new trial be granted . . . for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall appear that the error complained of has resulted in a miscarriage of justice." In *Curtis v. Curtis*, 250 Mich. Curtis, 105, 229 N.W. 622 (1930), the court said it was not an abuse of discretion to refuse to reverse the judgment against the infant merely for failure to appoint a guardian ad litem.

¹⁵ Ill. Rev. Stat. 1937, Ch. 7, § 8(14).

business, to "lay off" some of their milk wagon drivers. The Milk Wagon Driver's Union, of which the discharged employees were members, objected to the Meadowmoor system, since the vendors did not observe union hours or methods, and the union picketed the company's plant as well as the stores which purchased its milk.¹ The company sued to enjoin this conduct and the Illinois Supreme Court held that the anti-injunction act² could not "be invoked for the purpose of compelling a producer not employing labor to change its system of distribution."³ The court further stated that an employer-employee relationship would be essential⁴ to an application of the act, in accordance with the decisions of the federal courts under the Clayton anti-injunction provision.⁵

Behind the construction of every such act lurks a constitutional question. In *Truax v. Corrigan*,⁶ where picketing, accompanied by libellous signs, obstructions of the entrances to the plaintiff's place of business, and threats to the plaintiff's customers, was resorted to, the Supreme Court of the United States held that the Arizona act was unconstitutional, as construed to forbid an injunction under such circumstances. The court indicated that if a state statute legalizes previously unlawful conduct in labor disputes, to the detriment of an employer's "property rights," the statute violates due process of law. If, on the other hand, the provision merely denies equitable relief under the circumstances, equal protection of the laws is denied. In either case the classification is unreasonable under the *Truax* case. Where acts of Congress are involved, equal protection of the law is not guaranteed by the Constitution,⁷ but denial of equitable relief to protect a "property right" if based upon an unreasonable classification would seem to violate due process.⁸ The latter point has not been adjudicated authoritatively

¹ Violence was alleged and proved by the plaintiff. This matter has a bearing on the constitutional issue. See notes 10 and 21 *infra*.

² Ill. Rev. Stat. 1937, Ch. 48, § 2a: "No restraining order or injunction shall be granted by any court of this State, or by a judge or the judges thereof in any case involving or growing out of a dispute concerning terms or conditions of employment, enjoining or restraining any person or persons, either singly or in concert, from terminating any relation of employment or from ceasing to perform any work or labor, or from peaceably and without threats or intimidation recommending, advising, or persuading others so to do; or from peaceably and without threats or intimidation being upon any public street, or thoroughfare or highway for the purpose of obtaining or communicating information, or to peaceably and without threats or intimidation persuade any person or persons to work or to abstain from working, or to employ or to peaceably and without threats or intimidation cease to employ any party to a labor dispute, or to recommend, advise, or persuade others so to do."

³ *Meadowmoor Dairies v. Milk Wagon Drivers' Union, Etc.*, 21 N.E. (2d) 308 at 313 (Ill., 1939).

⁴ *Ibid.*, at 313.

⁵ 29 U.S.C.A. § 52.

⁶ 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254 (1921).

⁷ *Truax v. Corrigan*, 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254 (1921); *Siddons v. Edmonston*, 42 App. D.C. 459 (1914).

⁸ See *Dent v. State of West Virginia*, 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623 (1889); *McCray v. United States*, 295 U.S. 27, 24 S. Ct. 769, 49 L. Ed. 78 (1904).

in regard to anti-injunction acts.⁹ A further question is presented in regard to the constitutional issue. Where the "laborers" have engaged in unlawful conduct as an incident to their picketing, is a statute violative of due process or equal protection of the laws which forbids an injunction against the peaceful picketing? Does labor lose its right to picket peacefully by merging it in an unlawful plan? The courts have not been uniform in their holdings on this point,¹⁰ but it would seem that such a construction would not render the act unconstitutional.¹¹

It seems rather likely that these constitutional problems had something to do with the evolution of the doctrine that an anti-injunction act is not applicable unless the disputing parties stand in the relationship of employer and employee. Conduct which has been recognized as lawful in a dispute between an employer and his workers and their union has not been so recognized in other types of disagreement.¹² This fact, in view of the *Truax* case, has caused the courts to evince a justifiable tendency to require the relationship as an essential to the invocation of the act. The fact that many of the earlier cases laying down the doctrine have involved situations where the conduct was unlawful seems to strengthen this conclusion. Thus we find that the rule was invoked to defeat the operation of the Clayton provision where a secondary boycott

⁹ See *Blankenship v. Kurfman*, 96 F. (2d) 450 (1938); *Senn v. Tile Layers' Protective Union*, 301 U.S. 468, 57 S. Ct. 857, 81 L. Ed. 1229 (1937); *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323, 58 S. Ct. 578, 82 L. Ed. 872 (1937); *Levering & Garrigues Co. v. Morrin*, 71 F. (2d) 284 (1934).

¹⁰ *United States v. Railway Employees' Dept. A.F.L.*, 283 F. 479 at 494 (1922), in which it was said that "the so-called peaceable and lawful acts are so interwoven with the whole plan of intimidation and obstruction that to go through the formality of enjoining the commission of assaults and other acts of violence and leave the defendants free to pursue the open and ostensibly peaceful part of their program would be an idle ceremony." To the same effect, see *Vaughan v. Kansas City Moving Picture Operators' Union*, 36 F. (2d) 78 (1929). But see *Great Northern Ry. Co. v. Local G.F.L. of I.A. of M.*, 283 F. 557 (1922), where it was said: "In respect to the terms of the order, it is proper to observe that they must be within section 20 of the Clayton Act . . . which provides that in strikes ex-employees shall not be restrained 'from recommending, advising, or persuading others by peaceful means' to quit work, or to refuse to work for the employer, nor 'from attending at any place where any such person or persons [ex-employees] may lawfully be, for the purpose of peacefully obtaining or communicating information' or to exercise persuasion as aforesaid, nor 'from peaceably assembling in a lawful manner, and for lawful purposes.'" See also *Great Northern Ry. Co. v. Brosseau*, 286 F. 414 at 423 (1923): "There will be some hotheads, and a few who may be believers in dynamite and the dagger as a means of furthering the cause of working men. I cannot conceive, however, of a graver injustice than to treat the acts of any such individuals or groups as an index of the character or intent of any union in the railway service. . . . Why not deal with such wrongs and crimes as we do in other fields of life? Why not treat them as the acts of those who do them, or aid and abet such doers? Why not hunt down the guilty persons and punish them, and not impute their misdeeds to the striking union and its officers? . . . Just legal administration can give but one answer to these questions."

¹¹ *American Steel Foundries v. Tri-City C.T. Council*, 257 U.S. 184, 42 S. Ct. 72, 66 L. Ed. 189 (1921).

¹² See *Quinton's Market v. Patterson*, 21 N.E. (2d) 546 (Mass., 1939); note, 99 A.L.R. 533.

was resorted to,¹³ where interference with contract was present,¹⁴ and where acts of violence had been committed.¹⁵ The later cases extended the doctrine to situations where peaceful picketing was the sole conduct of the employees.¹⁶ Furthermore it was held that labor unions, none of whose members were employed by the plaintiff were not "employees" under the act.¹⁷ Some decisions¹⁸ carried the doctrine to the point where the relationship was required as of the time of the injunction suit, which ruling virtually nullified the act, since every employer would naturally discharge a picketing employee.¹⁹ The Supreme Court of the United States limited the doctrine in *American Steel Foundaries v. Tri City Central Trades Council*,²⁰ where it was held that the Clayton Act did apply and did forbid an injunction of peaceful picketing by ex-employees and by a labor union which reasonably contemplated employment of its men by the plaintiff, even where there had been some violence²¹ before the suit was brought.

It is interesting to note that the language in the Clayton Act which

¹³ See *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 41 S. Ct. 172, 65 L. Ed. 349, 16 A.L.R. 196 (1920); *Central Metal Products Corporation v. O'Brien*, 278 F. 827 (1922), app. dismissed 284 F. 850 (1922).

¹⁴ *Montgomery v. Pacific Electric Ry. Co.*, 258 F. 382 (1919); *Armstrong v. United States*, 18 F. (2d) 371 (1927); *Buyer v. Guilan*, 271 F. 65 (1921).

¹⁵ See *Quinlivan v. Dail-Overland Co.*, 274 F. 56 (1921); *International Organization, Etc. v. Red Jacket C. C. & C. Co.*, 18 F. (2d) 839 (1927); *State ex rel. Hopkins v. Howat*, 109 Kan. 376, 198 P. 686 (1921); *Vaughn v. Kansas City Moving Picture Operators' Union*, 36 F. (2d) 78 (1921).

¹⁶ *Waitresses' Union v. Benish Restaurant Co.*, 6 F. (2d) 568 (1925); *United States Gypsum Co. v. Heslop*, 39 F. (2d) 228 (1930); *Montgomery v. Pacific Electric Ry. Co.*, 293 F. 680 (1923), cert. den. 264 U.S. 586, 44 S. Ct. 334, 68 L. Ed. 862 (1924). See also *Ferguson v. Peake*, 18 F. (2d) 166 (1928).

¹⁷ *Waitresses' Union v. Benish Restaurant Co.*, 6 F. (2d) 568 (1925). This view was rejected in regard to the Illinois Act in *Schuster v. International Ass'n of Machinists*, 293 Ill. App. 177, 12 N.E. (2d) 50 (1937).

¹⁸ *Canoe Creek Coal Co. v. Christinson*, 281 F. 559 (1922). See also *A. J. Monday Co. v. Automobile, A. & V. Workers, Local No. 25*, 171 Wis. 532, 177 N.W. 867 (1920), where the court stated that an employer-employee relationship as of the time of the suit was necessary and then proceeded to grant an injunction against all save peaceful conduct, which was all that the court could constitutionally do under *Truax v. Corrigan*. For a discussion of the lengths to which the doctrine was carried under the Clayton Act, see F. Frankfurter and N. Green, "Congressional Power Over the Labor Injunction," 31 Col. L. Rev. 385 at 405.

¹⁹ See the dissent of Justice Brandeis in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 41 S. Ct. 172, 65 L. Ed. 349, 16 A.L.R. 196 (1920): "If the words are to receive a strict technical construction, the statute will have no application to disputes between employers of labor and workmen, since the very acts to which it applies sever the continuity of the legal relationship." See also the dissent in *G. Heitkemper v. Central Labor Council*, 99 Ore. 1, 192 P. 765 (1920): "It seems . . . that to hold that this statute only applies in cases where the employees were still actually engaged in working for their employer, and that it was not intended to be effective in cases where the relation of employer and employee are temporarily suspended by a strike . . . would be altogether too narrow—so narrow as to be absolutely absurd. Such a construction would entirely defeat the obvious purpose of the statute."

²⁰ 257 U.S. 184, 42 S. Ct. 72, 66 L. Ed. 189 (1921).

²¹ This point is of interest in that it indicates an attitude on the part of the

the courts seized upon to justify the employer-employee doctrine was not incorporated in the Illinois act,²² which would seem to indicate that the legislature disapproved of the doctrine, at least in its extreme implications. It would seem, however, that the legislature did not contemplate the type of controversy represented by the instant case. Surely it was not meant that labor unions should be permitted to picket a man merely because he distributes his goods through independent contractors and not through employees of his own. If the act were construed to deny injunctive relief in such a case, the constitutional question of *Truax v. Corrigan*²³ might be raised again. Therefore it seems that the instant case was sound, but it is unfortunate that the decision was couched in the terms of the employer-employee doctrine, since there is a danger that future cases²⁴ will extend the rule to the unjustifiable limits that were reached under the Clayton act.

W. L. SCHLEGEL

INTERNATIONAL LAW—RELATIONS BETWEEN STATES—JURISDICTION OVER FUNDS DEPOSITED WITHIN A STATE BY FOREIGN CORPORATIONS.—In the days of the Imperial Russian government, a Russian insurance corporation, desirous of doing business in New York, complied with the New York statute by depositing with state officers a required sum from its capital as security "for the protection of all its policyholders and creditors within the United States." This sum was by statute considered as the aggregate capital of the corporation in regard to business done under the statute.¹ The Soviet government later decreed that all insurance companies be nationalized and their property become state property. Soviet Russia not yet being recognized by the United States, this decree was disregarded as

Supreme Court that the Clayton Act could constitutionally forbid an injunction against peaceful conduct even where there had been acts of violence.

²² The Clayton Act reads as follows: "No restraining order or injunction shall be granted . . . in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment. . . ." This language is not present in the Illinois Act, which otherwise follows substantially the terms of the Clayton Act.

²³ 257 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254 (1921).

²⁴ The case of *Ross W. Swing v. American Federation of Labor* (not reported at time of going to press) in the Illinois Supreme Court on rehearing, has held that the Anti-injunction Act does not apply to a labor union which the employees have refused to join.

¹ "No insurance corporation organized and existing under the government or laws of any state or country outside of the United States . . . [shall transact business here unless it] shall have securities or other property within the United States, deposited with insurance departments or state officers. . . . For all purposes specified in this chapter, the capital of such a foreign insurance corporation . . . shall be the aggregate value of all securities and other property [so deposited]." Consol. Laws of N.Y., Ch. 30, § 27. Compare the Illinois provisions. Ill. Rev. Stat. 1937, Ch. 73, §§ 720, 721, 722, requires the foreign insurance company to file certain information and obtain a certificate of authority. Section 723 (3) provides, "Before a certificate of authority is issued to a foreign or alien company . . . it shall deposit with the Director securities which are authorized investments for similar domestic companies . . . of the amount, if any, required of a domestic company

to extraterritorial effect, and the company, though dead in Russia, continued to do business in New York until 1925. At this time, the Superintendent of Insurance, pursuant to court order, took possession as liquidator, paying off domestic policyholders and creditors and foreign lien creditors. There was a considerable sum remaining, which was deposited with the sole remaining director as a conservator on delivery of a bond that he would distribute to creditors and shareholders on court order and only then. Foreign creditors and stockholders immediately brought suit for parts of that fund, and during pendency of the consolidated suits the United States recognized Soviet Russia. The United States, as assignee, under the treaty with Russia, of the Soviet Union's claims, now also laid claim to the fund.

The New York Court of Appeals denied the claim of Russia and of its assignee, the United States, to the fund, holding that the distribution of funds to foreign creditors and shareholders would still go on under the jurisdiction of the courts of New York. The court conceded that a recognition as a *de jure* government acts retroactively, validating all previous decrees made by that government, but said that the decree would have no effect upon these assets of the branch of the company, (1) because, despite the fact that all the expert testimony was to the contrary, the decree was not intended by Russia to apply to these assets, and (2) even if it was so intended, these assets were beyond the jurisdiction of Russia, since the insurance company, by complying with the insurance laws of New York, in effect created a subsidiary corporation organized under the laws of that state, so that the sum deposited must be governed by the laws of that state, regardless of the status of the parent company. Upon both points, three of the seven judges of the Court of Appeals dissented, expressly denying that the branch was either a factual or a legal entity, since the deposit of funds was mere "security for business transacted by it here and not elsewhere."²

A mere *de facto* government's decrees have no extraterritorial effect, except as to property within the jurisdiction at the time of the decree.³ The power to recognize this sovereign as a government *de jure* rests in the

similarly organized and doing the same kind or kinds of business, or, in the case of such alien company, of the amount of two hundred thousand dollars; or in lieu of such deposit such foreign or alien company shall satisfy the Director that it has on deposit with an official of a state of the United States, authorized by the law of such a state to accept such deposit, securities of at least a like amount, for the benefit and security of all policy obligations of such company in the United States."

² *Moscow Fire Ins. Co. v. Bank of New York & Trust Co.*, 20 N.E. (2d) 758 (N.Y., 1939).

³ For a full discussion of this point, see note, 17 CHICAGO-KENT LAW REVIEW 286. See also E. D. Dickinson, "The Unrecognized Government or State in English and American Law," 22 Mich. L. Rev. 29; T. Baty, "So-called 'De Facto' Recognition," 31 Yale L. J. 469; L. Connick, "The Effect of Soviet Decrees in American Courts," 34 Yale L. J. 499; M. A. Kallis, "The Legal Effects of Non-recognition of Russia," 20 Va. L. Rev. 1; note, 38 Harv. L. Rev. 816. The "refusal to give effect to decrees of unrecognized states conflicts with the principle that the acts of a government in its own territory will not be inquired into by a foreign court." O. K. Fraenkel,

executive and legislative departments of the forum, and not in the courts.⁴ When such a recognition takes place, the courts take judicial notice of it⁵ and consider it to relate back to the time when the new government actually gained power.⁶ The acts and decrees of such a recognized power over property within its jurisdiction will be given effect⁷ by our courts,⁸ with several exceptions, two of which are pertinent here: (1) Penal statutes, and, some say, statutes imposing a forfeiture, will not be enforced by another nation;⁹ and (2) a foreign statute which is against the public policy of the forum, it has been held, will not be enforced.¹⁰ Neither of these principles was made a basic ground for the decision.

Before recognition of Russia, our courts refused to give its decrees effect, but originally declined to allow the directors of the dissolved companies to recover balances in this country, on the ground that it might subject the depositary to double liability if he ever decided to do business in Russia.¹¹ However, where the depositary was a state trustee, this objection was held not to apply;¹² and later, when the danger of double liability was seen to be remote, even a private depositary was ordered to pay over the funds to the directors.¹³ The recognition of Russia raises the question of whether the Soviet Union does not have the right to the funds.

The New York court can find some authorities sustaining its position that the decrees were not intended to confiscate these assets. The law of a foreign country must be proved as matters of fact are proved,¹⁴ but from

"The Juristic Status of Foreign States, Their Property and Their Acts," 25 Col. L. Rev. 544 at 563.

⁴ *Jones v. United States*, 137 U.S. 202, 11 S. Ct. 80, 34 L. Ed. 691 (1890); *Duff Development Co., Ltd. v. Kelantan Government*, [1924] A. C. 797; *Oetjen v. Central Leather Co.*, 246 U.S. 297, 38 S. Ct. 300, 62 L. Ed. 726 (1918).

⁵ *Ricaud v. American Metal Co.*, 246 U.S. 304, 38 S. Ct. 312, 62 L. Ed. 733 (1918).

⁶ *Oetjen v. Central Leather Co.*, 246 U.S. 297, 38 S. Ct. 300, 62 L. Ed. 726 (1918); *Monte Blanco Real Estate Corp. v. Wolvin Line*, 147 La. 563, 85 So. 242 (1920).

⁷ Joseph H. Beale, *The Conflict of Laws*, III, 1664: "A court neither will nor can apply any law to the case before it other than the law of the forum. It must necessarily follow that foreign law, in so far as it is in any way material to the issue, must operate not as law but as fact."

⁸ *Princess Paley Olga v. Weisz*, [1929] 1 K.B. 718; *Ricaud v. American Metal Co.*, 246 U.S. 304, 38 S. Ct. 312, 62 L. Ed. 733 (1918); *Terrazas v. Holmes*, 115 Tex. 32, 275 S.W. 392 (1925); *Terrazas v. Donohue*, 115 Tex. 46, 275 S.W. 396 (1925); *Oetjen v. Central Leather Co.*, 246 U. S. 297, 38 S. Ct. 300, 62 L. Ed. 726 (1918).

⁹ *Ogden v. Folliott*, 3 T.R. 726, 100 Eng. Rep. 825 (1790); *Macleod v. Attorney-General for New South Wales*, [1891] A.C. 455; *Lecouturier v. Rey*, [1910] A.C. 262.

¹⁰ *Wolff v. Oxholm*, 6 M. & S. 92, 105 Eng. Rep. 1177 (1817); *Vladikavkazsky Ry. Co. v. New York Trust Co.*, 263 N.Y. 369, 189 N.E. 456 (1934); see also concurring opinion of Justices Stone, Brandeis, and Cardozo in *United States v. Belmont*, 301 U.S. 324, 57 S. Ct. 758, 81 L. Ed. 1134 (1937). *Contra*, *Wright v. Nutt*, 1 H. Bl. 136, 126 Eng. Rep. 83 (1788).

¹¹ *Russian Reinsurance Co. v. Stoddard*, 240 N.Y. 149, 147 N.E. 703 (1925).

¹² *People, by Beha v. Russian Reinsurance Co.*, 255 N.Y. 415, 175 N.E. 114 (1931).

¹³ *Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank*, 253 N.Y. 23, 170 N.E. 479 (1930), cert. den. 282 U.S. 878, 51 S. Ct. 82, 75 L. Ed. 775 (1930).

¹⁴ *Fitzpatrick v. International Ry. Co.*, 252 N.Y. 127, 169 N.E. 112, 68 A.L.R. 801 (1929).

then on the question of construction is one for the court.¹⁵ British cases have held that the Russian decrees as to banks did not dissolve them,¹⁶ and on this authority a later British case came to a similar conclusion in regard to the similar insurance corporation decrees.¹⁷ However, a recent English decision came to an opposite conclusion as to banks and said that "even though the foreign law has already been proved before it in another case," this is not binding—"the Court must act upon the evidence before it in the actual case."¹⁸ If sound, this would destroy the validity of all authority on the question, including doubts expressed by the courts of many other nations.¹⁹

On the subsidiary corporation question, the court may have even more trouble. One dealing with a foreign corporation impliedly subjects his investment to acts of the corporation's sovereign, "in the absence of legislation equivalent to making it a corporation of the . . . [investor's] country."²⁰ Dictum in an earlier case stated that the status of the local department of a foreign corporation was "analogous to that of a corporation."²¹ A case which seems to be in point is *In re Stoddard*,²² dealing with an insolvent Norwegian insurance company. After paying all creditors on policies within the country, the court refused to pay further even to United States citizens on policies made outside of this country, instead turning over the funds to the Norwegian liquidator. The court expressly stated that the domestic agency was "a complete and separate organization," but went on to say this was only for the purpose of securing "business transacted by it here and not elsewhere," that "it is the fair presumption that the Legislature intended to adjust the amount of this capital to domestic business and to the risks incurred in issuing policies here, and not to those which might be incurred by issuing policies abroad. . . ."

Thus it is seen that the argument that the decrees were not intended to apply here is doubtful, and the argument that the local department was in effect a subsidiary corporation is probably erroneous. In view of this,

¹⁵ *Wheeler v. St. Paul Crushed Stone Co.*, 191 Ind. 75, 132 N.E. 1 (1921); *Electric Welding Co. v. Prince*, 200 Mass. 386, 86 N.E. 947 (1909); *Rice v. Rankans*, 101 Mich. 378, 59 N.W. 660 (1894); *Keasler v. Mutual Life Ins. Co.*, 177 N.C. 394, 99 S.E. 97 (1919). See also *Mexican C. R. Co. v. Gehr*, 66 Ill. App. 173 (1896).

¹⁶ *Russian Commercial and Industrial Bank v. Comptoir D'Escompte de Mulhouse*, [1925] A.C. 112. See also *In re Russian Bank for Foreign Trade*, [1933] Ch. Div. 745.

¹⁷ *Employers' Liability Assur. Corp. v. Sedgwick, Collins, & Co.*, [1927] A.C. 95. See also *Russian Ins. Co. v. London & Lancashire Ins. Co.*, [1928] Ch. Div. 922.

¹⁸ *Lazard Bros. & Co. v. Midland Bank, Ltd.*, [1933] A.C. 289 at 297.

¹⁹ See P. Wohl, "Nationalization of Joint Stock Banking Corporations in Soviet Russia and Its Bearing on Their Legal Status Abroad," 75 U. of Pa. L. Rev. 385 at 386, 392, 395. See also *United States v. Belmont*, 301 U.S. 324 at 326, 57 S. Ct. 758, 81 L. Ed. 1134 at 1137 (1937), in which, however, the effect of the decree was admitted by demurrer. *United States v. Belmont*, 85 F. (2d) 542 (1936).

²⁰ *Canada Southern Ry. Co. v. Gebhard*, 109 U.S. 527 at 537, 3 S. Ct. 363, 27 L. Ed. 1020 at 1024 (1883).

²¹ *Fred S. James & Co. v. Rossia Ins. Co. of America*, 247 N.Y. 262, 160 N.E. 364 at 365 (1928).

²² 242 N.Y. 148, 151 N.E. 159 at 162 (1926).

it seems possible that the majority holding is, in the words of the minority, "based on a lingering policy of non-approval and non-recognition of the nationalization and confiscation decrees of the Soviet government. . . ." ²³

R. W. BERGSTROM

JOINT TENANCY—SEVERANCE—EFFECT OF CONTRACT TO CONVEY ON AN ESTATE OF JOINT TENANCY IN LAND REGISTERED UNDER THE TORRENS ACT.—Alfred and Frances Hendriksen had an estate in joint tenancy in land registered under the Torrens Act.¹ Three days before he died, Alfred made a deed purporting to convey his interest to one Irving Naiburg, who in turn immediately made a deed running to one Louise Hendriksen as grantee. Approximately a month after the death of Alfred, Louise Hendriksen first presented the instruments for registration and requested that a certificate of title be issued to her on the property embraced by them. The statute provides that an unregistered deed on Torrens land shall operate only as a contract to convey between the parties,² and Frances Hendriksen opposed the application, contending that a contract to convey was not effectual to work a severance of the joint estate and that by virtue of right of survivorship she was now seized of the whole.

The Illinois Court in affirming a decision for the petitioner, Louise Hendricksen,³ held that proceedings under the Torrens Act were governed by equitable principles and, in accordance with such principles, a contract to convey effects a severance of the joint tenancy, there being nothing in the provisions of the Land Registration Act which necessitated a departure from the general rule here.

The authority on the effect of a contract to convey on an estate of joint tenancy is amazingly sparse, with the exception of brief text or encyclopediac statements,⁴ and largely English. As would be expected, those cases which hold that an agreement to convey effects a severance occur in equity, where the chancellor is aided in that conclusion by the doctrines of equitable conversion and equitable title and by a justified susceptibility to equitable considerations in general.

Apparently the only American decision in which the point was seriously raised is the case of *Kurowski v. Retail Hardware Mutual Fire Insurance Company*,⁵ decided by the Supreme Court of Wisconsin. The plaintiff

²³ *Moscow Fire Ins. Co. v. Bank of New York & Trust Co.*, 20 N.E. (2d) 758 at 774 (N.Y., 1939).

¹ Ill. Rev. Stat. 1937, Ch. 30, §§ 45 ff.

² Ill. Rev. Stat. 1937, Ch. 30, § 98: "A deed, mortgage, lease or other instrument purporting to convey, transfer, mortgage, lease, charge or otherwise deal with registered land, . . . shall take effect only by way of contract, between the parties thereto, and as authority to the registrar to register the transfer, mortgage, lease, charge or other dealing upon compliance with the terms of this Act"

³ *Naiburg v. Hendriksen*, 370 Ill. 502, 19 N.E. (2d) 348 (1939).

⁴ "A covenant to sell by a joint tenant severs the tenancy in equity, though not in law. . . ." 11 Am. and Eng. Encyc. of Law 1143. "A joint tenancy may also be severed by a contract or covenant, by a joint tenant, to convey or dispose of his interest. . . ." 33 C.J. 908. These statements are based almost wholly on the authority of the cases discussed further on in this article.

⁵ 203 Wis. 644, 234 N.W. 900 (1931).

there sought recovery for fire losses allegedly covered by a policy with the defendant company, which defended that the plaintiff was not the sole owner of the premises as required by statute. The plaintiff and his wife had been joint tenants in the property, and it was contended that by an agreement between the parties without conveyance such joint estate had been terminated and that, the wife now being dead, a half-interest in the property vested in her heirs. The court conceded that a mere contract to convey could effect a severance, but held that no severance resulted in this case, and thus their statement is purest dictum. In *Gould v. Kemp*,⁶ Kemp wrote a letter to one Ward stating that his (the writer's) share of property held by them jointly as legatees under a certain will was to be subject to disposition by Ward's will. A bill being brought by the executors of Ward to claim such moiety, the court regarded the legacy as in joint tenancy and held that the tenancy was severed by the missive. Commenting on the authorities, the court says: "This shews that the bare agreement has the force of actual severance, and that the severance is held to be executed, though there exists only an agreement which is as yet unperformed. . . ."⁷

In the case of *In re Wilford's Estate*,⁸ two sisters took certain houses under a will in what was said to be joint tenancy. Subsequently they agreed to make mutual wills devising the property to each other, with an undertaking that the survivor should make a will devising the property to certain persons then agreed on. The survivor failed to carry out the agreement, and on her death this bill for administration was brought, the residuary legatees of the survivor contending that she took the whole interest in the property on the death of her sister by virtue of right of survivorship. The court, however, ruled that the transactions between the sisters had severed the joint tenancy. An earlier case⁹ was a bill to compel surrender of a copyhold estate under a covenant in a mortgage to convey such interest. Defendant, as the widow of the mortgagor, claimed an estate in free bench,¹⁰ to which she was entitled under the laws if her husband died possessed of the estate and without alienating. The widow was ordered to execute instruments of conveyance, the court ruling that an agreement to convey is in equity a conveyance, since vendor or heirs could be held as trustee of the estate for the purchaser, and remarking, "A covenant by a joint tenant to sell, though it does not sever the joint tenancy at law, will in equity."¹¹ By the time *Burnaby v. Equitable Reversionary Interest Society*¹² was decided, the question whether a mere agreement could effect a severance of joint tenancy was hardly considered susceptible of argument, the court in that case being primarily concerned with the power of the wife of the plaintiff—an infant—to make such an agreement.

⁶ 2 Myl. & K. 304, 39 Eng. Rep. 959 (1834).

⁷ 39 Eng. Rep. 959 at 961.

⁸ 11 Ch. Div. 267 (1879).

⁹ *Brown v. Raindle*, 3 Ves. Jr. 256, 30 Eng. Rep. 998 (1796).

¹⁰ Free bench, according to 27 C.J. 895, is "that estate in copyhold lands which the wife has on the death of her husband for her dower, according to the custom of the manor."

¹¹ 30 Eng. Rep. 998 at 999.

¹² 28 Ch. Div. 416 (1885).

In another decision,¹³ the English court held that an agreement by a wife to convey any after-acquired property above a certain value to trustees severed the wife's joint estate as one of three cestuis under a trust subsequently set up. Said the court, "It is quite clear that any agreement to sever made by a joint tenant, if it binds the parties, if it is made for value, is just as effectual as if the intention of the parties expressed in the agreement had actually been carried out by a conveyance of the property."¹⁴

However, it was argued by appellant in the principal case that, even if a contract to convey would formerly effect a severance of an estate of joint tenancy, the principle was now modified by the Torrens Act. The object of the Torrens Act is to provide a method of registration of titles whereby, by reference to a certificate, the state of title to a particular piece of land may be ascertained and relied upon by those who would deal with the property.¹⁵ Appellant here can hardly claim estoppel by reason of the nonregistration, as she has in no way changed her position in reliance on the record title, so it is hard to perceive how the existence of the Torrens Act can aid her case in this respect.¹⁶ The court was asked to rule that, because the conveyance was not filed until after the death of the grantor, at which time the right of survivorship attached, the interest was not severed until that event. The appellant also argued, relying on the general rule that liens and conveyances affect Torrens land only on their being filed on the certificate,¹⁷ that the right of survivorship, being prior, took precedence,¹⁸ overlooking the fact that registration is important only to give notice, and that lack of registration should, in the absence of clear legis-

¹³ *In re Hewett*, [1894] 1 Ch. 362.

¹⁴ [1894] 1 Ch. 362 at 367.

¹⁵ As it was well stated in the case of *Application of Bickel*, 301 Ill. 484 at 491, 134 N.E. 76 at 79 (1922): "The general purpose of the Torrens system of registration of land titles has been variously stated by courts and other authorities to be, to provide a system of registration whereby it shall be possible for an intending purchaser of land to ascertain by an inspection of the register who may convey to him the title . . . to create an independent system of registration of land titles so that all instruments intended for the purpose of passing or affecting any title to real estate registered thereunder should be filed and registered in the office of the registrar and at no other place . . . to establish a system for the registration of title to land whereby the official certificate will always show the state of the title and the person in whom it is vested . . . to establish a method by which the title to a particular piece of land will be always ascertainable by reference to a certificate issued by a government official, made by law conclusive in that regard . . . and to establish a system for the registration of title to land whereby the official certificate will always show the state of the title and the person in whom it is vested. . . ."

¹⁶ 21 C. J. 1173: One who clothes another with title is estopped to deny such title, however, "in accordance with the general rules no estoppel arises in favor of one whose acts were not influenced by such conduct, or who has suffered no injury therefrom. . . . There can be no estoppel in favor of persons who did not act in reliance on the acts or representations of the party whom it is sought to estop. . . ."

¹⁷ Ill. Rev. Stat. 1937, Ch. 30, §§ 98, 119, 121-3.

¹⁸ That if severance does not occur before death survivorship takes precedence is well established. Thus a joint tenancy may not be severed or affected by devise or testamentary direction. *Bassler v. Rewodlinski*, 130 Wis. 26, 109 N.W. 1032 (1906).

lative intent, be of consequence only where one is prejudiced by such lack of notice. The court however refused to extend the rule beyond the limitations placed upon it by the underlying reason, and, in declining to add thus to the mysteries of property law, its conclusion appears fully warranted by precedent and common sense.

R. G. MAYER

TAXES—MULTIPLE TAXATION—DEATH TAX ON POWER OF DISPOSAL OF TRUST ADMINISTERED ELSEWHERE.—Two cases recently decided by the Supreme Court of the United States have clarified an issue upon which there has been much discussion¹ and, undoubtedly, the principles annunciated will have far reaching application.

In *Curry v. McCanless*,² a decedent, domiciled in Tennessee, created a trust in Alabama, with directions to pay the income to her for life, and with a reservation of the right to dispose of the trust estate by her will. The death tax was paid on the trust estate in Alabama, and the corpus of the trust was also included in her gross estate for purposes of the Tennessee transfer tax.

In *Graves v. Elliot*,³ a decedent, domiciled in Colorado, created a trust in Colorado, to pay the income to her daughter for life, and eventually to pay the principal to the daughter's children. She reserved the right to change the beneficiaries without their consent, to revoke or modify the trust, and to remove the trustee, but never exercised any of these powers. At the time of her death, the decedent was a resident of New York. Colorado collected a tax upon the transfer of the trust, and New York included the corpus of the trust in the decedent's gross estate for purposes of the New York transfer tax.

The court upheld the power of each state to tax in both instances. The basis upon which the decisions rest is that, since two distinct sets of legal relationships were created, one in the trustees and the other in the owner of the power of disposal, each was a source, or potential source, of wealth, receiving the benefit and protection of the state where located and consequently within its jurisdiction for tax purposes.

There is no express prohibition of multiple taxation in the Constitution. In 1905, however, the court took cognizance of the injustice of multiple taxation and clearly decided that tangible property permanently situated outside the state of domicile of the owner is subject to taxation only in the state where so permanently located, and not in the state of the

¹ Robert C. Brown, "Multiple Taxation by the States—What is Left of It?" 48 Harv. L. Rev. 407; Maurice H. Merrill, "Jurisdiction to Tax—Another Word," 44 Yale L. J. 582; John F. Bonner, "Single Situs for Inheritance Taxation of Intangibles," 16 Minn. L. Rev. 335; Francis C. Nash, "And Again Multiple Taxation," 26 Georgetown L. J. 288.

² 59 S. Ct. 900, 83 L. Ed. (Adv.) 865 (1939).

³ 59 S. Ct. 913, 83 L. Ed. (Adv.) 880 (1939).

owner's domicile.⁴ This principle was later extended to inheritance taxation.⁵

As to intangible personal property, however, there are two divergent lines of reasoning. One is based upon the conviction that multiple taxation is unreasonable and oppressive. Several divided opinions have allowed only one state to tax, by attributing to intangibles a situs at the domicile of the owner by the maxim *mobilia sequunter personam*, where no situs has already been established by legal ownership and control elsewhere.⁶

The other is based upon the theory that control, protection, and benefit are together the justification for all taxation, and therefore any state conferring such benefit or protection is entitled to its *quid pro quo*.⁷

From a purely legalistic standpoint this theory may be defended.

⁴ *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 26 S. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493 (1905).

⁵ *Frick v. Pennsylvania*, 268 U.S. 473, 45 S. Ct. 603, 69 L. Ed. 1058, 42 A.L.R. 316 (1925).

⁶ *Safe Deposit & Trust Co. v. Virginia*, 280 U.S. 83, 50 S. Ct. 59, 74 L. Ed. 180, 67 A.L.R. 386 (1929), where it was said that while the fiction *mobilia sequunter personam* may be applied in order to determine the situs of intangible personal property for taxation, it must yield to the established fact of legal ownership, actual presence and control elsewhere, and ought not to be applied if to do so would result in inescapable and patent injustice, whether through double taxation or otherwise. *Farmers Loan & Trust Co. v. Minnesota*, 280 U.S. 204, 50 S. Ct. 98, 74 L. Ed. 371, 65 A.L.R. 1000 (1930). "We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles. The difference between the two things, although obvious enough, is not sufficient to justify the harsh and oppressive discrimination against intangibles contended for on behalf of Minnesota." *Baldwin v. Missouri*, 281 U.S. 586, 50 S. Ct. 436, 74 L. Ed. 1056, 72 A.L.R. 1303 (1930); *Beidler v. South Carolina Tax Commission*, 282 U.S. 1, 51 S. Ct. 54, 75 L. Ed. 131 (1930); *First Nat. Bank v. Maine*, 284 U.S. 312 at 326, 52 S. Ct. 174, 76 L. Ed. 313 at 319, 77 A.L.R. 1401 (1932), which states, "Due regard for the processes of correct thinking compels the conclusion that a determination fixing the local situs of a thing for the purpose of transferring it in one state carries with it an implicit denial that there is a local situs in another state for the purpose of transferring the same thing there."

⁷ *Safe Deposit & Trust Co. v. Virginia*, 280 U.S. 83, 50 S. Ct. 59, 74 L. Ed. 180, 67 A.L.R. 386 (1929), where Mr. Justice Stone, concurring, specifically exempts from the decision whether or not Virginia, had it so desired, might have taxed the equitable interests of the beneficiaries of the trust held in Maryland. He contends that there would be no double taxation in the real sense, since the legal interests protected and taxed by the two taxing jurisdictions are different. Mr. Justice Holmes, dissenting in the same case, said that the fact that the legal title is in trustees in Maryland and may be taxed there does not affect the right of Virginia to tax the equitable interest in Virginia, since this is not prevented by anything in the Constitution. *Farmers Loan & Trust Co. v. Minnesota*, 280 U.S. 204, 50 S. Ct. 98, 74 L. Ed. 371, 65 A.L.R. 1000 (1930), where Mr. Justice Stone, concurring, said that a single economic interest may have such legal relationships within different taxing jurisdictions as to justify its taxation in both. Consequently, no principle broadly prohibiting taxation merely because it is double should be laid down. Mr. Justice Holmes, dissenting, said that it is not disputed that the transfer is taxable in New York, but there is no constitutional objection to the same transaction being taxable in Minnesota, inasmuch as Minnesota law keeps the debt

There is ample authority that a power to appoint by will, reserved by the donor, and the power to revoke a trust, even though unexercised, are property rights, and consequently proper subjects for taxation.⁸

However, the court early in the century developed the doctrine of "business situs" to permit state property taxation of intangibles used in a localized business owned by a domiciliary of another state.⁹ It was decided that the legal fiction expressed in the maxim *mobilia sequunter personam* must yield to this extent, at least, to actual control elsewhere.¹⁰ This doctrine was reaffirmed in *Wheeling Steel Corporation v. Fox*.¹¹

There is no question that real estate and tangible personal property may only be taxed where such property is physically present.¹² Not to allow intangible property, which has acquired a legal situs in a state, the same immunity as that given to tangible property belonging to an individual, or to intangibles belonging to a corporation under the business situs doctrine, seems to be lacking in logic. Multiple taxation of intangible property is just as objectionable from an economic standpoint as either of the other two instances.

A great many of the states have passed reciprocal tax statutes in order to avoid multiple taxation.¹³ These statutes, however, are not uni-

alive and hence is entitled to the quid pro quo in return. *Baldwin v. Missouri*, 281 U.S. 586, 50 S. Ct. 436, 74 L. Ed. 1056, 72 A.L.R. 1303 (1930), where Mr. Justice Stone, dissenting, said that to hold one must pay taxes in two places, reaching the same economic interest, with respect to which he has sought and secured the benefit of the laws in both, does not seem to him so oppressive or arbitrary as to infringe constitutional limitations.

⁸ *Chanler v. Kelsey*, 205 U.S. 466, 27 S. Ct. 550, 51 L. Ed. 882 (1907); *Bullen v. Wisconsin*, 240 U.S. 625, 36 S. Ct. 473, 60 L. Ed. 830 (1916); *Saltonstall v. Saltonstall*, 276 U.S. 260, 48 S. Ct. 225, 72 L. Ed. 565 (1928); *Chase Nat. Bank v. United States*, 278 U.S. 327, 49 S. Ct. 126, 73 L. Ed. 405 (1929); *Guaranty Trust Co. v. Blodgett*, 287 U.S. 509, 53 S. Ct. 244, 77 L. Ed. 463 (1933); *Reinecke v. Northern Trust Co.*, 278 U.S. 339, 49 S. Ct. 123, 73 L. Ed. 410 (1929). See also Frederick O. Dicus, "Taxation of Powers of Appointment under the Illinois Inheritance Tax Law," 14 CHICAGO-KENT REVIEW 14; Frederick O. Dicus, "Taxability of Rights of Withdrawal under Federal Estate Tax," 17 CHICAGO-KENT LAW REVIEW 209; Erwin N. Griswold, "Powers of Appointment and the Federal Estate Tax," 52 Harv. L. Rev. 929; "—A Dissent," W. Barton Leach, 52 Harv. L. Rev. 961.

⁹ *New Orleans v. Stempel*, 175 U.S. 309, 20 S. Ct. 110, 44 L. Ed. 174 (1899); *Bristol v. Washington County*, 177 U.S. 133, 20 S. Ct. 585, 44 L. Ed. 701 (1900); *State Board of Assessors v. Comptoir National D'Escompte*, 191 U.S. 388, 24 S. Ct. 109, 48 L. Ed. 232 (1903); *Metropolitan Life Ins. Co. v. New Orleans*, 205 U.S. 395, 27 S. Ct. 499, 51 L. Ed. 853 (1907).

¹⁰ *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 221 U.S. 346, 31 S. Ct. 550, 55 L. Ed. 762, L.R.A. 1915C 903 (1911).

¹¹ 298 U.S. 193, 56 S. Ct. 773, 80 L. Ed. 1143 (1936).

¹² *Frick v. Pennsylvania*, 268 U.S. 473, 45 S. Ct. 603, 69 L. Ed. 1058, 42 A.L.R. 316 (1925).

¹³ Ill. Rev. Stat. 1937, Ch. 120, § 375:

"A tax shall be and is hereby imposed upon the transfer of any property, real, personal, or mixed, or of any interest therein or income therefrom, in trust or otherwise, to persons, institutions or corporations, not hereinafter exempted, in the following cases:

"(2) When the transfer is by will or intestate laws of property within the State, or having a taxable situs in this State and not subject to inheritance, succession

form,¹⁴ and, consequently, the results are not as satisfactory as could be obtained by allowing intangible property, which has a legal situs for tax purposes in one jurisdiction, immunity from taxation elsewhere.

J. R. SCOTT

WORKMEN'S COMPENSATION ACTS — INJURIES FOR WHICH COMPENSATION MAY BE HAD—WHETHER INJURY OCCASIONED BY RESCUE OF THIRD PERSON MAY BE HELD TO ARISE OUT OF EMPLOYMENT.—Prior to the injury which resulted in his death, one Puttkammer worked for the Wille Coal Company where he did general work around the coal yard and sometimes drove a truck. On the day of the fatal injury, Puttkammer had delivered his last load of coal and was on his way back to the yard. At the corner of One Hundred and Seventy-Third and Halsted streets the traffic was obstructed by two cars which had collided. Puttkammer pulled over to the east side of the four lane highway, stopped the truck, and went over to the cars, where he picked up an injured child. He was walking back to the truck when another northbound car struck one of the damaged cars and knocked it against Puttkammer, who was thrown to the street and killed. The Illinois Industrial Commission refused compensation on the ground that the injury did not arise out of the employment. The Superior Court of Cook County set aside this order and was sustained by the Supreme Court in *Puttkammer v. Industrial Commission*.¹ In the opinion, the court said that to be compensable the injury must have arisen out of and in the course of the employment,² that the giving aid to an injured child on the highway is natural, and that it is immaterial whether he went to the damaged cars to give aid or to see whether his way was clear, neither act taking him out of the course of his employment because it was foreseeable.

The modern tendency of the decisions is to allow compensation in every case where a liberal construction of the statute would justify it. But, as was said in one decision, "even in view of this liberal construction,

or estate tax in the state of the decedent's residence, and the decedent was a non-resident of the State at the time of his death.

"(3) When the transfer is of property made by a resident, . . . by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death, or where any change in the use or enjoyment of property included in such transfer . . . may occur in the lifetime of the grantor, vendor or donor by reason of any power reserved to or conferred upon the grantor, vendor or donor . . . to alter, or to amend, or to revoke any transfer . . . thus subject to alterations, amendment, or revocation.

"(4) Whenever any person . . . shall exercise a power of appointment . . . in the same manner as though the property . . . belonged absolutely to the donee. . . ."

¹⁴ Note, 43 Harv. L. Rev. 641; note, 28 Col. L. Rev. 806.

¹ 371 Ill. 497, 21 N.E. (2d) 575 (1939).

² "Arising out of" does not mean the same as "in the course of" the employment. See *In re McNicol*, 215 Mass. 497, 102 N.E. 697 (1913); *Mueller Constr. Co. v. Industrial Board of Illinois*, 283 Ill. 148, 118 N.E. 1028 (1918); *Griffith v. Cole Bros.*, 183 Iowa 415, 165 N.W. 577 (1917); *Larke v. John Hancock Mutual Life Ins. Co.*, 90 Conn. 303, 97 A. 320 (1916).

it is not enough for the applicant to say that the accident would not have happened if he had not been engaged in the particular employment or if he had not been at the particular place."³ The accident must occur because of something he was doing in the course of his employment and because he was exposed to some particular danger by the nature of his employment.⁴

According to the so-called doctrine of street risks, no compensation will be allowed in case of an injury or death from a peril to which the public at large is exposed, but there is a well recognized exception in the case of an employee whose employment requires him to be frequently or continually in the street.⁵ It is also held that injuries sustained by an employee who, when confronted by a sudden emergency, goes beyond his regular duties in an attempt to save himself from injury, to rescue another employee from danger, or to save his employer's property are compensable as they arise out of and in the course of the employment.⁶

In the case of *Sichterman v. Kent Storage Company*,⁷ the employee was a traveling salesman for the defendant. While traveling in his car on his return from making business calls, he came across a peddler whose wagon had been struck by another car. Sichterman drove about twenty five feet beyond, stopped, walked back, and had just asked the peddler if there was anything he could do when he was struck by another car. The

³ Walker v. Hyde, 43 Idaho 625, 253 P. 1104 (1927). To the same effect, see Peet v. Mills, 76 Wash. 437, 136 P. 685 (1913).

⁴ Walker v. Hyde, 43 Idaho 625, 253 P. 1104 (1927); In re McNicol, 215 Mass. 497, 102 N.E. 697 (1913); California Casualty Indemnity Exchange v. Industrial Accident Commission, 190 Cal. 433, 213 P. 257 (1923). Glotzl v. Stumpp, 220 N.Y. 71, 114 N.E. 1053 (1917), seems to be clearly out of line. There the employee was a driver of a florist delivery truck and assisted the man who accompanied him in order to deliver the flowers. The driver fell off a ladder while putting flowers in a window box and was injured. The court said, in refusing compensation, that there was no connection between driving a truck and the fall from the ladder; but it would certainly seem to be to the employer's interest for his employee to respond to a request to help with the flowers at a home where the delivery was made.

⁵ Mueller Constr. Co. v. Industrial Board of Illinois, 283 Ill. 148, 118 N.E. 1028 (1918); Beaudry v. Watkins, 191 Mich. 445, 158 N.W. 16 (1916); Kunze v. Detroit Shade Tree Co., 192 Mich. 435, 158 N.W. 851 (1916). In Capitol Paper Co. v. Conner, 81 Ind. App. 545, 144 N.E. 474 (1924) it was said, "The mere fact that the hazard is one to which every person on the street is exposed is not sufficient to defeat compensation." In New Amsterdam Casualty Co. v. Sumrell, 30 Ga. App. 682, 118 S.E. 786 (1923), the court stated, "If the work of an employee or the performance of an incidental duty involves an exposure to the perils of the highway, the protection of the Workmen's Compensation Act extends to the employee while he is passing along the highway in the performance of his duties."

⁶ Owners' Realty Co. v. Bailey, 153 Md. 274, 138 A. 235 (1927); Brock-Haffner Press Co. v. Industrial Commission, 68 Colo. 291, 187 P. 44 (1920); U.S. Fidelity & Guaranty Co. v. Industrial Accident Commission, 174 Cal. 616, 163 P. 1013 (1917); Dragovich v. Iroquois Iron Co., 269 Ill. 478, 109 N.E. 999 (1915); Ocean Accident & Guaranty Co. v. Industrial Accident Commission, 180 Cal. 389, 182 P. 35 (1919). See L.R.A. 1916A 57, citing Collins v. Collins, [1907] 2 I.R. (Ir.) 104, where it was said that the rule was otherwise where the perilous situation does not arise out of the employment, or where the employee goes to the aid of his employer who is being attacked by a gang of ruffians.

⁷ 217 Mich. 364, 186 N.W. 498 (1922).

court was of the opinion that the accident occurred when the employee was performing an act of humanity entirely dissociated from the employer's work and did not arise out of the employment.

In *Priglise v. Fonda J. & G. R. Company*,⁸ an injury was sustained by a flagman while trying to rescue a child who had fallen on the tracks of another railroad company whose tracks were parallel. The majority of the court, in holding that the injury did not arise out of and in the course of the employment, said the act of the deceased was not within his employment because the other railroad company employed a man to prevent the identical situation which led to the accident and so it could not have been contemplated that an emergency would arise authorizing Priglise to do what he did.

The instant case would seem to be out of line according to the present law upon the subject and the above cases.⁹ There appears to be no causal connection between the injury and the employment, except for the fact that were it not for the employment the employee would not have been at the place of the accident, which is, as has already been stated, not sufficient. The case would also be eliminated from the principle of emergency, which extends only to injuries received in the attempt of the employee to save his own life, the life of a fellow workman, or the employer's property. Here the injury was received while aiding a third person, a stranger to the employer, not on or near the employer's property. But in the three classes within the scope of the principle, the employer has a direct interest, for, when the employee saves his own life or the life of a fellow workman, it is a financial saving to the employer, and the same applies with respect to his property. The employer is not intended to be made an insurer of the safety of the employee at all times during the period of the employment, but only for injuries occurring during the performance of some acts for the employer in the course of the employment or incident to it.¹⁰

A rather dubious argument in favor of the decision may be founded on

⁸ 183 N.Y. S. 414 (1920).

⁹ See also *Babington v. Yellow Taxi Corp.*, 250 N.Y. 14, 164 N.E. 726 (1928), where the employee was a chauffeur for the employer. A police officer jumped on the running board of the cab and ordered the driver to chase another car in order that he might arrest the occupant. The cab collided with another car, and the driver was injured and died. Compensation was awarded, the court saying that since there was a statute compelling citizens, in a case of pursuit, to obey when so ordered by a police officer, the danger of pursuit was incidental to the management of the cab. It was a risk of the employment and an incident of his service. This case can be differentiated from *Kennelly v. Stearns Salt & Lumber Co.*, 190 Mich. 628, 157 N.W. 378 (1916), in which the employee, with a gang of men, was building a railroad when he and the others were ordered by the fire warden to assist him in putting out a forest fire. While he was so engaged, he was injured. There was a statute authorizing the fire warden to call to his aid in emergencies any able-bodied man over eighteen. The court refused compensation, but here the employee had left his work temporarily, while in the case of the cab driver, he continued to do the work of his general employment, the court being of the opinion that the owner of the cab could recover the customary rate of fare.

¹⁰ *N.K. Fairbanks Co. v. Industrial Commission*, 285 Ill. 11, 120 N.E. 457 (1918).

the basis of the employer's good will. Since it is the custom of business houses to have the name of the company or their trucks, if the employee had not stopped but passed by, such a cold-blooded act would have an effect on persons witnessing it which would be undesirable from the employer's standpoint, as it might cause those persons and others hearing of the incident to discontinue doing business with the company. Good will is a very valuable part of a business, especially a business that deals directly with the consumer, as in the case of a coal company. Again, it has often been said that the Workmen's Compensation Acts rest on economic and humanitarian principles. If this is true, nothing could move a court more easily toward invoking these principles than the giving aid to a stricken child. As was said in the dissenting opinion of one case,¹¹ if the employee could have given aid and had not, he might very well have lost his job. If the employer had seen the accident, he probably would have had the employee go to the rescue. It is a reasonable inference that, in the case of an emergency, a workman will conduct himself as a human being, and this the employer could foresee at the time of hiring a man.

Since the modern trend has been toward a liberal interpretation of the Workmen's Compensation Acts, this may be another extension along that line, but it is at the most a matter of conjecture whether other jurisdictions will follow it.

V. BUSSE

¹¹ *Priglise v. Fonda J. & G. R. Co.*, 183 N.Y. S. 414 (1920).